Continued (135)

Trespass for False Imprisonment

This like the last is an action of trespass. Every unlawful restraint of the liberty of another is false imprisonment, and it is immaterial what is the place of confinement if it be an illegal restraint 5 Bac 169. 3 Bl 127. Esp 6. 326.

It follows from the definition that there are two requisites to a false imprisonment 1st A detention 2d That the detention be unlawful

By detention is not meant a confinement to any particular limits as a wall square or an acre but that there should be some restraint Finch L. 137. (and same auth)

The unlawfulness consists in the want of lawful authority to confine this authority may arrise from having legal process to arrest and detain or any special cause amounting to a justification Salk 408. Esp Dig 333. 3 Bl 127.

Thus a peace officer or any other person has a lawful right to arrest a felon Esp Dig 334.

This action lies of course only in such cases as are cognizable by the common Law Thus this action does not lie for the confinement of persons captured in a Ship as a lawful prise although the capture turns out to be unlawful Doug. 572 note

I have observed the detention of another's person may be lawful when done by virtue of legal process but every original arrest for a civil cause without lawful process is false imprisonment 5 Bac 169. 2 Just 51-2.

And even a custom to imprison in civil cases without legal process is void (same auth)

A private person is justified in detaining a person arrested by a proper officer on his request or it would be more proper to say he is justified in assisting the officer to detain on request.

Still if the officer abandon the custody of the prisoner arrested on final process by delivering him into the hands of a private person the private person is not justified in detaining him 2 Roll 561. 5 Bac 169. title Sheriff 1 Bac R 24.

The most common cases of false imprisonment are those under void process. on this subject the distinctions are very artificial

1st First when a court of justice is guilty of false imprisonment by its own acts

If a court of record is guilty of ever so corrupt practices or ever so express malice in the imprisonment of a person

still they are not liable to this action if they were acting in a judicial character as a court. Comyn 172. Esp. D. 316. 635. 1 Tr. 503 513-4. 534-5. 537. 2 Bl R. 1141. (e.g.) If a court of record having cognizance of an offence sentences a person charged with it to imprisonment from the most express malice no action whatever can be maintained against them.

A Judge of a court of record of general jurisdiction can then never be liable to an action for any judicial act if it confines itself to its jurisdiction 12 Co 23-4. Salk 396. Ld Ray 467. Comyn 172. 1 T R 503. 534-5. 537-8. 513-4. 2 Bl R. 1141.

In such a case the individual imprisoned can have no remedy but the Judge who thus acts may be removed by government. This exemption must exist in every regular government in favour of some branch of it or there would be no end of a prosecution for one judge; or the judge of one court might imprison the Judge of an other for imprisoning him and so vice versa without end and again there would be no end of a suit for in false imprisonment against a Judge the whole merits of the former suit must be canvassed again and so in every subsequent action of false imprisonment

But if a court of record of general jurisdiction has not cognisance of the subject matter of the process the Judge may be liable but this is no exception to the general rule for the judge in this case does not act judicially for "quoad hoc" he is no Judge.

But when the court has jurisdiction of the subject matter for a transgression of their proper authority they are not liable for give them jurisdiction of the subject matter and then they act judicially and "quoad hoc" are a court. (e.g.) Suppose a court having jurisdiction of a certain offence inflict a higher punishment on the offender than the law warrants they are not liable again. Suppose the Court of Kings Bench should issue process returnable ten years hence: for imprisonment under this process they are not liable because in these cases they have jurisdiction of the subject matter 10 Coke 76a. 1 Wash 86. 59. 2 Bl R. 1145. Salk 396.

But Judges of courts of limited jurisdiction even if they are of record and have jurisdiction of the subject matter are liable if they transgress their limits 6 T R 412. 2 Bl R 1145. Ld Ray 454. Salk 396. Stra 993. 4 Coke 114. Esp D. 331. (e.g.) Suppose a court of limited jurisdiction in a case where they have jurisdiction of the subject matter of the process issue their precept to arrest a peer the Judges are liable in this action. So if they inflict a higher punishment for a given offence than the law allows. If however they do not exceed their jurisdiction though they decide a question wrongly however erroneous their judgment

may & still they are not liable in this or any action for things in the particular case they can still they do not exceed their jurisdiction or their authority 2 Bl R. 1145 and same auth)
No court of record is liable for mistakes acts if the Judge does not exceed his authority nor jurisdiction Salk 396. 2 Lev. 220.
By exceeding its jurisdiction is meant if instead a court acting on a case on which it has no legal power to act at all.
By a courts exceeding its authority is meant its exercising some power which the law does not authorize on a question which is properly cognizable by it.
But by Common Law a Court not of record are liable not only for malicious wrongs but for mistakes in Judgment. This is now mitigated by Statute 3 Hen 7 c. 10. Cro Eliz 786. 394. 1 Bl 354. 1 Ld Raym 536. Cro E. 337. 1 Bur 595. 2 Bl. R. 1145.

(136.) From what has been said it becomes necessary to consider what is a court of record.
It is defined to be any court that can fine and imprison. This definition cant be universal for the court of common pleas is a court of record and that cant fine and imprison except for contempts which any court can do. 2d Ray 1467. Salk 200. Lev 47. 3 Bl 25. 12. Mod 386. 3 Lev 205. 2 Bl R. 1146.
I can give a description of a court of record which will probably hold universally. Every court whose proceedings may be reversed by a writ of error is a court of record. This is not a logical definition but rather a description.
The arrest of an Executor or administrator for the debt of the testator is illegal and of course false imprisonment in the Pltff unless there is a suggestion of a devastavit and then they may be arrested 3 Wils 36. 2 Bl R. 1142 or 92. Lut R. 326.
And false imprisonment in this case lies not only against the Pltff in the process but the attorney if he was instrumental in causing the process to issue and indeed the rule is general that an attorney who is instrumental in an illegal arrest is liable in this action 4 Wils 345. 349. 2 Bl R. 1192.
I am now treating of the Pltffs liability whether the court is liable in this case depends on the principles laid down in the last Lecture.
Exemptions from arrest are connected with the character in which the person arrested stands as an executor. privilege & Or from temporary circumstances arising from a particular privilege as a Suitor a witness &c for parties and witnesses are not liable to arrest while a attending court. This is the privilege of the court and not of the party and witness 4 Bac 222. 2 Roll 493. 1 Tr. Bl. 636. In the latter cases the arrest in the first instance is not unlawful for the sheriff cant determine whether he is a witness or not but the court will discharge him on motion or grant a

supersedeas and then if the sheriff detains him he is guilty of false imprisonment and becomes a trespasser by relation from the time of the arrest. 2 T R 534. 2 Bl R. 1113. 1142. 4 B R. 377. 6 Mo Jam 379. Doug 649. 653.

And this priveledge of a suitor and witness extends to his horse clothes money &c. 2 Roll Ab. 4 Bac 229.

In Cant. we issue what is called a writ of protection before the suitor or witness comes to court. this writ issues as a matter of course and answers no other purpose than as evidence of an exemption and if he is arrested before he shows his protection he may compell the officer to discharge him by showing it and if the officer does not then discharge him he is liable in false imprisonment. The use of this writ is only as evidence of his being a party or witness his right of exemption from arrest is complete without it.

And if a person is arrested while attending court as a suitor or witness this does not affect the writ 2 Bl R. 1192. 1 Bl 220. When a peer is arrested in a civil cause he may maintain his action against the Off. but not against the Sheriff So in a case of an executor arrested for the debt of his testator 10 Co. 76. Doug 646. 654. 2 T R 231. Esp D. 5-30.

We have seen it is a general rule that a suitor or witness while attending court is protected from arrest but if he is made a party by collusion and that fact be proved he is not entitled to the protection So if a witness procures himself to be summoned by collusion when he knows nothing of the cause. So if a person brings a vexatious suit he is not entitled to the protection of a suitor but this last rule will be difficult in application 2 Bl R 1193. 1 Mod 79. Cowp 9. 1 W. Bl 636. Salk 5-44.

The interposition of the Court is discretionary. Hence if a person attends court as a mere volunteer when there is no suit depending which requires his attendance he is not protected Salk 5-44.

And this protection is extended to the parties and witnesses attending an arbitration under a rule of court but if the arbitration is not under a rule of court I think they would not be protected 3 East 89. Peak Ev 193-4.

If a Jailer detains a prisoner for his lawful fees he is not guilty of false imprisonment for he has a lien on the person of his prisoner for his fees but he cant detain a prisoner for his board lodging &c. Where he is not obliged to furnish 5 Bac 171. 1 Vent 237. 1 Sow. 6. 173. Plow 6 R. 1 Mod 132.

False Imprisonment

If an order is issued by court to confine a person in a certain prison the confining him any where else is false imprisonment Salk 408. 3 Salk 219. 5 Mod 295 Hob 202. Lalch 16.

A peace officer is justified in arresting a person without warrant even though it turns out that no felony has been committed for if there was a reasonable ground to suspect the person it excuse him 1 Roll 43. Doug. 334. 345. 4 Bac 517.

In an arrest in such a case by a private person the rule is somewhat different. The rule is if it turns out that a felony has actually been committed a private person is justified in arresting without warrant on reasonable ground of suspicion. A private person however in such a case does not arrest for imprisonment but merely for examination. for he is not obliged to arrest and ought not to be protected so far as a peace officer who is bound D. 334-5. Doug 345-5 Bac 171.

So any private person may arrest another to prevent a breach of the peace or an escape without a warrant 2 Hawk 82. 1 Bals 150. An original arrest on Sunday by the Statute 29 Car 2 is unlawful but the statute extends only to original arrests 5. Mod 95. Salk 78. 2 Lev 111. 1 T R 265. 2 Bl. R 1195. 2 Bals 72. Bac b. 327. 605.

Where a bail may retake a prisoner who has escaped on a sunday for this would not be an original arrest so special bail may take their prisoner on Sunday for he is a prisoner in their custody and it is the same as a retaking by the Sheriff 2 Bl R. 1273.

Where there is an actual escape an arrest on Sunday is justified it is said under an escape warrant why is an escape warrant necessary for the Sheriff may arrest on escape on sunday without a warrant I think an escape warrant in such a case is matter of mere civility and not absolutely necessary except where a private individual retakes but it is never necessary where the retaking is by the very man from whom he escaped — Salk 626. 3 Salk 144 Bac Dig 605. Exception - Bail to the Sheriff can retake their prisoner on Sunday 2 Bl R. 1273. The reason is not given but I suppose it is that where bail is to the Sheriff a right to retake is not necessary because constant custody is not necessary for they may permit a person arrested an more access to go at large provided they are forthcoming &c.

An arrest in a civil cause by breaking the outer door or window of the best mansion house is unlawful and the person making it guilty of false imprisonment 5 Coke 93. Cowp 1. Hob 62. 2 Bacon 367. 2 Mc Nac 489. This strange rule originated out of the feudal system and a feudal baron's house was his castle What is a breaking? In Burglary a mere lifting the latch is a breaking but this would not be a breaking in the present case for here there must be a removal of some fastening calculated to defend the house against thieves

and robbers. for that is the reason of the rule that a mans castle shandd not be broken to at in thieves and robbers. This privilege is now construed strictly. for when a person once gets into the house he may break open inner doors closets chests &c to make an arrest but before he breaks them he must demand to have them opened then if they are not opened he may break them 1 Cowp 6-7. Hob 62. 263. Esp Dig 604-5. Comb 17. 327. 2 Show 87.

And this privilege extends only to the person family and effects of the person dwelling in the house for As. house is no protection to B as his property Hob 62. 5 Co. 93. 1 Sid 186. 4 Bac 455.

But in criminal cases the rule does not hold for an officer who has a criminal process to execute may after demand to have them opened with notice of his business break outer as well as inner doors 5 Co. 91. 4 Bac 454.

So may an officer who has a process to compell one to find sureties to keep the peace for this is in form and effect a criminal process. Moor 606. 12 Co. 131. 4 Bac 454-5.

And also where one having committed a felony is pursued either with or without warrant by an officer or by a private person 4 Bac 455-5. 2 Hawk 139.

But where one is barely suspected of a felony an arrest by a private person without process is justified or not by the event of the trial (some auth)

One may also break outer doors &c. to prevent murder or a breach of the peace

And so if one having just made an affray and is immediately pursued to his house 4 Bac 456. 1 Root 66.

So a Sheriff may break outer doors to execute any civil process viz. the writ of "habere facias possessionem" for the nature of the case requires it 4 Coke 91. 4 Bac 455.

And to execute ordinary civil process the door of a barn or out house may be broken 1 Sid 186. 1 Keb 698. 4 Bac 456.

And a tradesmans store not connected with his house may I think be broken open to execute civil process. so is the practice in this county Bro Jam 555. Palm 52. 4 Bac 456.

And if a person being arrested escape into his own house the party having a right to retake may break the house to do it 4 Bac 456. Palm 54. 6 Mod 173.

(137.) With regard to the effect of the illegality in breaking a house on the execution of the process it was formerly holden that the execution of the process was good notwithstanding the breaking but now the rule seems to be that the execution is void although it is a matter of discretion with the court whether they will discharge a person so arrested on motion or not Cowp 1. 9. Esp Dig 604-5. Bro Elix 908. 5 Co. 92. 5 Wooll 155. that the rule now is different see 2 Bac 367. 4 Bac 454. 2 Bl R 823.

The party so arrested may be relieved by Habeas Corpus.

It has been questioned whether if after an illegal arrest by breaking the house another arrest is made by another Off on another writ is it good or not. The rule seems to be settled that the latter arrest is good unless there was collusion between the parties to the two arrests 2 Bl R 823. Esp Dig 608.

It has been decided that a party who has escaped may be retaken by an officer under an escape warrant I think there is no need of an escape warrant in such a case unless the person retaking is not the person who made the arrest and then it may be good evidence of his authority to retake 1 Root 107.

So also special Bail may retake their prisoner at any time and any where, this it is said may be done under a bail piece 5 Bac R 172. 7 Johns 145. So I think they may without and that the only use of it is as evidence of their right to retake

If an officer by mistake arrest B in a process against A he is liable in this action. Further it is said that where B told the officer he was A and the officer being unacquainted with both thereupon arrested him still B had a right to sue for false imprisonment. This latter rule I think is not law for B is the faulty cause of his own arrest and it a general rule that when one is the faulty cause of a trespass he can maintain no action for it. Bang 142. 2 Roll 552. Esp D. 314. Hardres 523. for the general rule see 1st Ray 177. Salk 642.

In Cont. id is false imprisonment if an officer arrests the Deft after he has tendered sufficient personal property to answer the demand against him 1 Root 120. 1 Hen Stat 5 R. not so at C. L. 5 Bac 171.

Any person has a right to arrest one who is beating another and it is not false imprisonment 1 Hawk 136. 2 do. 81. 5 Bac 171.

Tho' in one case it is not false imprisonment to arrest a Feme Covert with her husband yet she must be discharged on common bail. Stra 1242. 1 Ld Raym 486. 1 Bl R 2, 72. 1193.

But there are cases where the Jus brought an action of false imprisonment and I think she cannot maintain an action for a false imprisonment of herself because she may be arrested but her remedy is to apply for a discharge on filing common bail that is an action Bang 648. Salk 115. 2 W. Bl 17.

Arresting and confining for the purpose of an examination under a penal warrant is excused provided the party so arrested is not holden but a reasonable time as if a justice on seeing an affray should command a person to arrest them and bring them before competent authority for examination. Hoor 4 R. 5 Bac 172. 1 Root 166.

Any person may arrest and confine another who is disordered in his mind and appears disposed to do mischief 5 Bac 172.

False Imprisonment

When there is an illegal arrest not only the Plff. but the officer making it is in some cases liable. — When —

If an officer makes an arrest on a process on the face of which it appears that the court issuing it had no jurisdiction from what ever cause this want of jurisdiction arrose he is liable in this action

This defect of jurisdiction may arrise in three ways. 1st from the subject matter of the case in process. 2d from the local limits of the court and 3d from some privilege of the Deft as that he is an attorney of another court.

The rule to repeat it is if an officer make an arrest on a process on the face of which it appears there is a defect in the jurisdiction of the court in any of these three ways he is liable Hardres 480. Bul NP 3. 1st D. 391. It is said

The rule to this extent extends only to courts of limited jurisdiction but this is denied 1 Ld Ray. 230.

But the rule it is said is extended still further. If the court has not jurisdiction whether it appear on the face of the process or not the officer executing it is liable. this is said down obiter in the Marshalsea case 10 Co. 76—7. Cro Jam 314. 1st D. 337. 2 Wils 380. Contra Ld Ray 230. Stra 910. 993. 5-07. This rule I think is not law

The only point judicially decided in the marshalsea case is that if the court has not jurisdiction of the subject matter of the process the officer is liable whether it appears on the face of the process or not. the rule in so far as this is subscribe to as Law Bul NP 2-3 1 Vent 333-4. Comyn 172. Hardress 480. Stra 710. but even the rule to this extent is questioned 2 T R. 65 3-4.

I take the rule to be this when a court though of limited jurisdiction has cognisance of the subject matter of the process which it issues the officer arresting under it is excused unless it appear from the face of the process that the Deft is entitled to some exemption arrising from his personal privilege as an attorney of another court and then in would be liable but if the privilege does not appear on the face of the process he is excused Comyn 20. 5 Bac 170. 2 Mod 196. 1 Vent 309. Bul NP 2-3. Carth 274. 2 Mod 29. 3 Bac 233. Hardress 480. Stra 710. (Contra 10 Co. 76. 3 Wils 345. 5. 6 or 7 Cok 5-4a

But an officer is justified in arresting under a process of a Court of general jurisdiction as the courts of Westminster Hall even though it appears on the face of the process that the Deft is privileged from arrest. as by being described as an Attorney of another court. 10 Co. 76. 5. 6. or 7 Coke 54a 3 Wils 345. Then if one of these courts issues process against a peer describing him as a peer still the officer is justified in arresting him In Cont. the rule is that an officer is justified by his process in

all cases if the want of jurisdiction does not appear on the face of the process or record Kirby 110. 182. 2 Swift 387.

Subject to the preceding rules where a court having jurisdiction in a cause issues a process void for irregularity or malice still if the process is not void the officer is justified in acting under it 2 T R 231. 7 do 455. 2 McNal & H 49. 3 Wils 345.

On the other hand where the want of jurisdiction go only to the person or please the officer is not liable unless the want of it appears on the face of the process nor then when it issues from the courts at westminster Hall. This rule will not hold in case of final process. The distinction between mene and final process is for this reason that on mene process the officer has nothing to look to but the process itself but on final process he may resort to the record to determine whether it is void or not. Bul N.P. 220.

Where the officer is justified because the want of jurisdiction does not appear still the Plff in the process is not justified for he is bound to know what his cause of action is and where it arrose Cro Jam 314. Bul N.P. 1 Vent 369. 2 East 260. 2 Mod 196-7. Esp Dig 330.

And if the original Deft appears and pleads this does not oust him of his right of action against the Plff (same auth) Carthew 1 Ld Ray 230. but not Law.

In some cases where the process is void the Plff and as the case may be the court even where their jurisdiction is complete in all respects may be liable in this action. This leads to distinctions which do not depend at all on the circumstance whether the court has jurisdiction or not.

1 In case a court of limited jurisdiction does not strictly pursue an authority given by statute their proceedings are void and any act done under them is illegal and of course an imprisonment is false imprisonment N.P. 60. 14. Salk 408. 1 Stra 710. Esp D. 331-7. Thus in England the game laws give Justices power to commit persons violating them if they have not sufficient effects to answer the damages if a Justice commits a person who has sufficient effects he is guilty of false imprisonment 1 Wils 153. Esp D 332. But the officer who committs on this case would not be liable because whether he has sufficient effects or not does not appear on the face of the process. 2 Bl R 1035. 1141. Esp Dig 331.

2d In other cases the process of any court may be void on the ground of irregularity independent of any question of jurisdiction The Plff in than cases is liable in this action as suppose a process issues returnable five years hence 3 Wils 341. 345.

False Imprisonment

2 Bl R. 845. Salk 700. Esp D. 328-9. But the officer would not be liable in this case 3 Wils 345.

But if the officer should execute such a process after it had been set aside for irregularity he would be liable 3 Keny 5. 2 Bl R 845. 3 East 128. Stra 509. 15 East 612. 615 note. 1 Wils 345. Esp D. 391.

This applies to courts of general jurisdiction

3dly. Where the jurisdiction is complete and the process in all respects regular the officer is liable for any subsequent oppression or cruelty, so the magistrate is also liable if he was in fault 1 T R. 536. Esp Dig 322.

December 4th 1820.

(138.) When an officer justifies proof that he acted as an officer is prima facie sufficient evidence of that fact but this presumption may be rebutted 1 Stra 1005. 3 T R 632. 4 T R. 366. 2 Mc Nal. 485.

An officer acting under a process of arrest that is founded on previous irregular proceedings

3 East 128. Stra 509. Ray 73. Viner. ab. title warrant. 1 Lev 95. 1 Sid 292. 1 Wils 105. Stra 993-4.

An officer is not liable for executing an irregular process untill after it has been set aside for irregularity but the Off is before Ray 73. 3 Bain 2 Bl R 845. 3 East 128. 1 Stra 509. 15 East 612. 615 note 1 Wils 345.

But it is no objection to the legality of an arrest that it was made under irregular process untill the process is set aside for irregularity An irregular process justifies all acts done under it untill it is set aside but a void process as a general rule never justifies 3 Wils 345. Stra 509. Esp D. 391.

I have seen no definition of an irregular process but I think any process may be said to be irregular which can be set aside in a summary manner (i.e) on motion. A process may be made irregular in several ways. 1st when it is not filled up by proper authority (e.g) where the sheriff left a process with a blank for the Deft name for the attorney to fill up. 2 Wils 47. Esp D. 329.

2dly When it issues informally (eg) Where an issuing of process from the vice chancellors court it is necessary for the Off to swear he believed the Deft about to leave the kingdom he swore that he suspected him about to leave the kingdom Stra 993. Esp 0329 In this case the Off court and sheriff were subjected Stra 994. It is questioned in 2 Wils 85. I think the decision in Strange right. for they joined in their plea

So a writ not made returnable on a day certain is irregular and void in this case it is proper that the officer should be subjected. Bro Jan 314. 2 Bulst 36. 1 Mod 81. Esp D. 330.

if the process is irregular

False Imprisonment

This example has been denied and doubted if the writ be made returnable to the next term of the court it is sufficient 2. Hall 1 K. Comp 21 2. This rule applies only to mere process.

Again – Arrests under general search warrants are illegal and indeed a general search warrant is in all cases void for it puts it into the power of the officer executing it to arrest whom he pleases and makes him the judge who to arrest. 1 Hale 150. 2 Wils 275. Bac a. 399.

There are certain requisites necessary to a good search warrant 1st it must be granted on oath. 2d the grounds of suspicion must be alledged in it. 3d every search warrant must be executed in the day time and by a known officer and not by a person specially deputed 4th it must be executed in the presence of the informer 5th it must be directed to a particular place. All these requisites are necessary to be observed or the informer is a trespasser whether he finds the thing sought for or not and even if they are all observed the informer is justified or not by the event of the search 2 Wils 291-2. Bac 399.

When an officer justifies under a process he is bound to show nothing more than the process and if it were process and the return day was arrived he must show that it has been returned 6 Co. 52-2 Rolls 563. Stra 1184. Bac Lib 333-7.

The officer is not bound to show that he has returned final process for as regards the writ in such proofs he is not obliged to return it so the rule obtains only in mere process 6 Co 52 a 20.4 Co. 67. 3 Co 90 a 1 Wils 17.

Where the action is brought against the under Sheriff he is not obliged to show a return even of a mere process after the return day (ib auth) the reason is he cannot make a return so that if it is not returned it is not his fault.

But if the Plff in the process is sued he must to justify show not only the process but the judgment for the judgment may have been reversed but the Sheriff is a stranger to this Salk 409. Bac a. 333 4.

The rule is the same where the action is against a third person who procured the process to be served for he stands in the place of the Plff – but a person who aided the sheriff to make the arrest is not bound to show more than the officer for he stands in the place of the officer. Salk 409.

If a Sheriff having made an arrest neglects to return the process where by law he ought to return it he it is said said is a trespasser ab initio (i e) liable for the original arrest. 2 Roll 563. Salk 409. 1 Roy 632.

This rule perplexes many weak heads in consequence of another rule that appears inconsistent with it (viz) When a person acts under an authority of law he is never liable but for an actual misfeasance which amounts to a trespass. These rules are not inconsistent because when the process should have been returned but is not it cannot be given in evidence to show that he was acting under authority of law for not being returned it is no process (Quere in case of a deputy see supra 11)

Where the original Plff and officer are sued together in false –

False Imprisonment.

– imprisonment they may join or sever in their pleas but if they do join and the plea is insufficient as to one it is bad as to both for if a plea in justification is bad in part it vitiates the whole So if the Plff and Sheriff are sued together for an imprisonment on final process and they join in their plea and the Plff fails to produce a judgment the plea is bad as to both although if the Sheriff had pleaded alone his justification would have been complete on producing the process 1. Stra 993. 1124. 509. 1 Wils 17. Bop 6. 336.

Procuring commanding Aiding or abetting in a false imprisonment makes the parties so doing jointly liable as joint trespassers and liable the same as the actor himself for in trespass all are principals 1 Inst 57 a. 1 Salk 407. 2 Hawk 5-12.

And any person who is wrongfully instrumental in imprisoning another although he does not procure it or do any forcible act whatever is guilty of false imprisonment as where a man gave the key to a room in which he had a person imprisoned to his servant there as the servant was made keeper and did not release the person he was held liable 3 Wils 377. 1 Inst 57.

The procuring a sovereign prince by threats menaces & falsely to imprison another makes the person so procuring guilty of false imprisonment 2 Bl R 980. 1055.

End
of False Imprisonment

(137)

This is an action on the Case brought to recover damages against one who has prosecuted the Plff maliciously and without probable cause either in a civil or criminal proceeding

By malice is meant any wicked motive whatever. By the want of probable cause is meant the want the want of a reasonable ground of suspicion 1 Bac 61. Esp Dig 5-25-7.

This action is somewhat analagous to the old action of conspiracy which is not now general though it may be brought.

The action of conspiracy lies only against two or more who have prosecuted the Plff maliciously &c. for treason or felony by which his life may be endangered 1 Saund 230 note 3 Bl 126. 2 Bulst 271. Esp D. 5-30. Ld Ray 379.

It is also somewhat analagous to the action on the Case in the nature of a conspiracy which lie where two or more have conspired together to prosecute or injure the Plff in any manner whatever 2 Salk 14. Esp D. 5-30. 1 Saund 230a 1 Bac 61.

In the action for malitious prosecution the gravamen resembles the gravamen in the action for slander for it is not necessarily noris it generally the damages to which the Plff is exposed but it is for the vexation expence or scandal which the Plff has or may suffer in consequence of it. 10 Mod 219. 220. 3 Bl 127. Stra 691. 2 Salk 13 H.

To keep up the boundaries between these action I would remark That the action of conspiracy does not lie unless there has been a prosecution of the Plff for treason or felony and an acquittal (i.e) he is found not guilty 12 Co. 23. Bro Jun H. Esp D. 5-27-H. 5-30. 1 Dik 211.

Persons may be indicted for an unlawful conspiracy to prosecute but the action of conspiracy dont lie unless there has been an actual prosecution and acquittal 2 Lev 5-1. 2 Keb 56. Esp D. 5-30.

So an action on the case in the nature of a conspiracy will lie although one person was an actual prosecution & a false charge is sufficient 1 Roll 112. 1 Bac 61.

In an action of conspiricy if all but one are acquitted or found not guilty Judgment cant be rendered against him but if it had been an action on the case in the nature of a conspiracy it might Ld Ray 379. Esp D 5-30. Bul 14. 1 Mod 210. 2 Lev 52. Hay 176.

In an action of conspiracy the danger of punishment is the gravamen but in an action on the case in the nature of a conspiracy the vexation expence or action is the gravamen Esp D 41. 3 Bl 126-7. Bul 14. 2 Stra 691. 1 Saund 230a

An action on the case in the nature of a conspiracy is similar to the action for malicious prosecution with this difference that the latter may be brought against one alone and the former must be brought against two or more charging that the with

Malicious Prosecution

another conspired &c. So that the wrong must have been committed by two or more 2 Lev 52. Esp D. 31. Cro El 173. or 239. 1 Vil. 10. Bul 14. 2. Roll 407.

In both these latter actions though two or more are sued still Judgment may rendered against one alone.

These three actions were all unknown to the common Law though it is said in some books. That the action of conspiracy was a C.L. action. It was introduced by Ed. 6th and the writ was framed by his direction I therefore think it not a C.L. action. The other two are founded on the Statute of Westminster 2d 13 Rieves. H.C.L. 548. 127. 2 Ro. 32 K. 2 Lev 2 Contra Bul 14 but I think not Law

It is essential to this action for malicious prosecution that the former prosecution should have been malicious and without probable cause. by probable cause is meant a reasonable ground of suspicion as belief 4 Bur 1971. Esp D. 529. 1 T.R. 544 5

It follows that this action lies against any one who maliciously promotes a prosecution without reasonable ground of suspicion

It is always sufficient for the Deft to show a probable cause for prosecuting even though he acknowledges he prosecuted with the most express malice in short if the Deft shows a probable cause for prosecuting he is completely justified for that in itself is a complete justification Bul 14. Cro Eliz 90. Esp D. 535.

In this State where this action is brought for maliciously prosecuting a former civil suit it is called an action for a vexatious lawsuit. This distinction is founded in the phraseology of our Statute

In trying of it when brought for a former criminal prosecution three rules are to be observed 1st If a man is falsely (ie) without probable cause and maliciously indicted or prosecuted for a crime which in its nature tends to injure his reputation the prosecutor is liable in this action Ayl. 46. Salk 14. 1 Sid 15.

2 The rule is the same if the former prosecution tends to expose his life or liberty Salk 15.

3 It may be founded on a former indictment which subjects the party to vexation expence or scandal 2d Ray 374. Stra 947. Esp Dig 52 K. Those are the three classes where the action is founded on a former prosecution of a criminal nature

In the first class of cases it is not necessary to enable the person prosecuted to maintain this action that his life or liberty in that particular instance should have been endangered it is sufficient if the charge had that tendency 4 T.R. 247. 3 Bl 127. Salk 15 1 Bac 61.

So also if an indictment is preferred to the Grand Jury who find it not a true bill still the prosecutor is liable in this action for the vexation expense and scandal is the same though perhaps not in so great a degree Cro Jac 496. Salk 14. Esp D. 528.

Expense alone caused by an insufficient indictment will support this action Salk 15. 3 Bl 127. 10 Mod 148. 214. 6 do 25. 73 137. 2 Stra 977. Contra Salk 14-5. but not law.

A public officer prosecuting on false information is not liable in this action, nor is the attorney general but the person who gave the false information if he did it without probable cause is liable 1 Leon 189. Cro Eliz 130. 2 TR 231.

But if even a public officer prosecutes without information from his own mere motion he is liable as any other person 2 TR 231-5. Cro Eliz 130. Cowp 164.

It was holden in Cro Eliz that the party suing the magistrate granting the warrant ought to sue in trespass for false imprisonment and not in case for malicious prosecution because the injury is immediate but where the prosecution is at the instance of a third person the injury is consequential but see 2 TR 231. Esp D 530.

But this action cannot be maintained until the malicious prosecution for which it is brought is in some way at an end it is not necessary that it should be at an end by acquittal but must be at an end in some way otherwise this absurdity might follow after the Plff had recovered in this action he might be found guilty on the prosecution, and the fact that it is at an end must appear in the Declaration for that is a part of the res gesta 1 do 56. Doug 205. 2 TR. 231. Hob 267. Stra 114.

It has been decided that the omission of this allegation in the declaration is cured by a verdict for the Plff though it would be bad on demurrer 1 Saund 228. Esp D. 532. I can't see the reason of this decision.

And it is necessary that he should allege the end of the prosecution exactly as it took place Thus where he alledged he was acquitted and the evidence was that the attorney general entered a Nol. Pros. he was nonsuited Bul 14. Esp D. 536. Salk 21. 10 Mod 261.

The declaration must state the commencement of the former prosecution and the subsequent proceedings substantially as they happened

The declaration need not recite the whole record but if it does and there is a misrecital in a material part it is fatal but a misrecital in an immaterial part does not vitiate 4 TR 590. Esp D. 530.

A variance in the statement of the day of the Plff's acquittal has been held a material variance 6 Mod 216. 2 Bl. R. 1050.

It seems agreed that no civil action will lie against Judges of a court of record Jurors or grand Jurors for any malicious

acts done by them while acting in their Judicial capacity 1 T R 503. 513-4. 534-5. 537-8. Cowp 161. 172. 2 Bl R 1141. 12 Co. 23.
I think the rule extends to grand and petty Jurors for it is a rule of public policy to protect their independance &c. and I think they come within the reason of the rule as it respects Judges-

To support this action malice and the want of a probable cause must concur. Malice may be and generally is infered from the want of a probable cause but the want of a probable cause can never be infered from the most express malice 4 Bur 1974. Esp D. 529. See a very important not only on this subject but on the whole title 1 T R 544.

(146.) But although malice is generally infered from the want of probable cause still this does not preclude the Plff from proving actual malice and to do it he may given in evidence any collateral circumstance whatever which will have a tendency to prove it Stra 691. Esp D. 535.
If the Plff was actually convicted in the former prosecution it is conclusive evidence that a probable cause existed but this rule presupposes the conviction to have been in a court of competent jurisdiction 1 Wils 232. Hob. 267. 6 Mod 262. Esp D. 529.

An acquittal on the other hand is in most cases presumptive or prima facie evidence of the want of a probable cause but in no case is it more than prima facie evidence of that fact for a man may be acquitted when there is very strong evidence against him. the effect of this being prima facie evidence is that it throws the onus probandi of there being a probable cause on to the Deft in this action 1 Wils 232. Esp D. 520.
And the Plff acquittal in the original action is prima facie evidence of the want of a probable cause even though it arose from a defect in the Indictment or any other cause whether on the merits or not 4 T R 247. Salk 15.
Whether a finding by a Grand Jury of ignoramus on the bill of indictment is prima facie evidence of the want of probable cause seems not to be settled by direct authority Salk 15. I should think it was not. for it is in effect saying they nothing about it.
But the Plffs acquittal, is not in all cases prima facie evidence of the want of probable cause Thus when a magistrate binds one over to take his trial and on the trial he is acquitted here the finding of the magistrate rebuts the presumption of the want of probable cause arising from acquittal or he is bound to discharge, if there is not a probable cause to believe him guilty. So also, finding a true bill by the grand Jury rebuts the presumption of a want of a probable cause arising from the acquittal, and in these cases —

Malicious Prosecution

The onus probandi lies on the Plff in this action to prove there was no probable cause. So also it will if the Judge in the former trial report that there was a probable cause 2 Bul 14. Salk 15 Esp D. 529-0-6.
But when the fact whether probable cause or not must necessarily lie in the knowledge of the Deft in this action (as where he was the only complainer) he must show a probable cause even though the Plff in this action was bound over by a magistrate &c. (same auth.)
And to do this he may prove the evidence given on the prosecution before the grand Jury and even what he & his wife swore to before the grand Jury may be proved by persons who heard them although they cannot testify directly in this case. but if there is some other witness who was present at the perpetration of the original crime who is cognizant with the facts he must be called and the Deft or his wifes evidence on the prosecution cant be proved 2 Bul 14. Esp Dig 535-6. This is a rule of evidence established for the protection of prosecutors.
The evidence of a probable cause in any given case is a question compounded both of law and fact whether such and such facts existed is a question of fact but when the facts are found to exist whether those facts amount to a probable cause is a question of law. 13 R 3-19. 545. 2 Bul 14. Esp D. 529.
Hence it is that the Deft in pleading a justification on the ground of a probable cause must shew all the circumstances which go to prove a probable cause however multifarious they may be 6 Eliz 134. Esp D. 533.
And it seems essential in all cases where the Deft justifies on this ground to shew that the crime charged was committed by some one or has been committed for otherwise it is said there can be no probable cause 6 Mod. 216. Esp D 534. 2 Hawk 120.
When this action is brought for a former prosecution of the Plff for a felony a copy of the original record is indispensably necessary to be produced by the Plff. or he cannot maintain his action and the granting of this copy is discretionary in the court where the original record is and they will refuse to grant it if they think the prosecutor acted bona fide 1 Bl R. 385. 1 Bac Ab. Esp D. 534.
But when the crime for which the original prosecution was brought was only a misdemeanor such a copy is not necessary. (same auth.)
I can see no reason for this diversity it appears to be a mere arbitrary rule of practice
In the former case it is usual for the court to deny a copy if it appears the prosecutor conducted honestly though the person prosecuted was acquitted Coath 421 3 Bl 126. Esp D 534.

2 Le I now proceede to treat of this action when founded on a prior malicious civil suit
The general rule is said to be that this action dont lie for

bringing a groundless civil suit even though there was no right of action in the Plff for it is said the bringing is a claim of right and if the Plff does not succeed he at common Law is amerced pro falso clamore and now by statute the Deft recovers his costs which is a satisfaction for the the expences. Bul 11. Salk 13: 14. 1 Bac Ab 205. Esp Dig 525.

The exceptions to this rule are so numerous that it is of little or no use The meaning of it I think is that where the prior prosecution is a civil one the law presumes no damage as it does where it is a criminal and if none are presumed they must appear or no action will lie.

1. The exceptions are 1. Where there is a good existing debt in favor of A against B. and C having no authority from A commences a suit against B to recover it this action will lie for as to C there is no cause of action Bul 12. Salk 14. Esp Dig 526

2. Where the plaintiff in the original action or suit has a good cause of action and sues to recover it in a court which has no jurisdiction this action lies. according to other opinions which I think the better this qualification must be added to the rule. Where he knew at the time of bringing the suit that the court had no jurisdiction 4 Bac. 14. 2 Wils 302. Esp Dig 526. Bul 12. For without this qualification I cant see any malice which is essential to this action

3. Where A sues B having no right of action but colour of right and knows it at the time this action will lie against him 2 Wils 305. 1 Bac Ab 388. 2 Mo. 12 pl. 3 Dart 314.

4. If for the purpose of vexation a person having a good cause of action for a certain amount sues for an extravagant sum he may be liable 1 Lawrence 224. 1 Sid 424. Esp Dig 525-6.

But an action will not lie in this case unless the Deft were holden to excessive Bail because otherwise he sustains no damage on account of the excessive sum's being insisted for. Bul 12. Esp Dig 526.

But when the suit is clearly groundless and that fact known to the Plff. this action lies whether he has been holden to excessive bail as to any bail at all or not 2 Wils 305 Esp Dig 529. 1 Bac Ab 388

And this action will lie in such case though the original proceedings were a final process as execution Hob 266 an important case Hob 105. Bul 12.

When this action is brought for a prior malicious civil suit the particular grievances or damage must be alledged and proved; for it is not enough to conclude with the general allegation of damage but he must shew how he has been damaged the reason is the law in this case presumes no damage (see above the general rule and meaning of it) Salk 14-5. Ld Raym 374.

The Plff. in this case must also allege that the prior proceedings were malicious and intended to injure and oppress the Plff. or something to this amount 2 Wils 305. 1 Salk 14. 1 Sid 424. Ld Raym 380. Bul 12.

In all cases where this action is brought for a prior civil suit

the Plff must allledge and prove special damage Salk 14-5. 2d Ray 374
but if B.a Stranger incites B to sue A wrongfully and A brings this action
against B. he need not allledge any special damage if P.S. had no
claim of right whatever Salk 14. 2d Ray 340.

When this action is brought for a prior civil suit two requisites are nec
essary 1st That it appear the prior suit is ended 2d The Plff must allledge
and prove special damage which must accrued or inevitable in consequence
of it hence if A forges a bond against B. this action cannot be brought
against A until an action has been brought on the bond for untill
then he has sustained no damage Bacq 205. Salk 15. Esp. B 5-27, 5-31.

Stra 14. Bul 13.

The first requisite is also necessary where this action is brought for a
prior criminal prosecution

A Statute at Bent gives in this action treable damages to be recovered
by the party suing and inflicts on the deft a fine as for a misdemeanor
and for the third offence he may be prosecuted as for a common cor-
rector.

It has been holden at Bent that two persons cannot maintain
this action jointly for there can be no joint right violated thir
is true as a general rule but I think it depends on the same Sirby 145.
principles as the joinder of two Plffs in the action of Slander
I therefore think joint traders might might jointly maintain
this action if their joint interest was violated by the prior suit
But two persons may be joined as defts in this action because
two may join in prosecuting indeed it is a test in which any
number may join in committing Bul N. 1 Stra 79. 2 Ld. 910. Esp. 5.
5-37.

There has been some question where two or more are joined as both
whether the Jury may sever the damages. There are but two cases
on this subject and they are contradictory to each other 1 Stra
79. 2 Ld. 910.

The rule I think is the same in this case as in the action
for assault and Batty I therefore refer you to that title where
you will find the subject handled at length. Assault & Battery 47.
I will however lay down one rule Where the injury is such that
it is indemnifiable in its nature there can be no recovery

End of Malicious Prosecution

Trespass.

For Injuries to Personal Property

(141.)

In case "Trespass" as used at C.L. denotes any injury committed with force either to the person or property of another 3 Bl 208. Esp D. 384.

The action of trespass of which I now propose to treat is one brought to redress all forcible injuries to the personal chattels of another.

The injury for which a person may be liable in this action may arise in two ways.

1) It may consist in the unlawful abuse of personal property by a third person while the owner continues possessed without altering the possession. or

2) It may consist in the amotion or dispossession of the owner. 3 Bl 145.

Cases of the first kind (i.e.) of abuse without altering the possession are not very frequent but it may consist in killing or destroying property leaving it in the owners possession or in any forcible act which diminishes its value without altering the possession 3 Bl 152.

In cases of this kind where the act is forcible and the injury immediate the proper remedy is by an action of Trespass 3 Bl 153. 2 Roll 556. Esp D. 594.

Here I would observe generally that if case is brought when the action ought to be Trespass and vice versa the Declaration is radically ill and will not be cured by a verdict 2 Mod. 131. Bro Ab 141. or 196. 6 T R 125.

Cases of the second kind (i.e.) Trespass by amotion or dispossession of possession consists in the unlawful taking of another's goods from his possession for except in a few cases a mere unlawful use when the original taking was lawful will not sustain this action and a mere unlawful detainer in such a case never will but the action of trover would be the proper action 3 Bl 152.

This action like all other personal actions gives only damages for the injury done by taking the property and not the property itself 3 Bl 151.

And this action will never lie for such injuries to property as is properly cognizable by a court of admiralty or prize Court as for goods taken in a ship as lawful prize Doug 572. 594.

There are some cases forming exceptions to the general rule

on which the action will lie although the original taking was lawful. Thus where a person as a Sheriff takes goods by authority of law and afterwards abuses that authority by using the goods so taken as he had no right to do he becomes by this act a trespasser ab initio as if an officer should distrain a beast as an estray and should afterwards kill it or sell it he would be liable as a trespasser ab initio for the first taking and in such case this is the proper action
6 mo Gow 447. 1 T.R. 12. & Co. 146. 3 Wils 20.

The rule is this when the authority to do the original act is given by the law itself a subsequent abuse of that authority will make the abuser a trespasser ab initio. The abuse converts the lawful act into a trespass But 81. 2 Bl R. 1281. & Co 146 a.k. 3 Wils 20. 1 Show 12. 1 Bur 2d. 1 T.R 12. Salk 221.

Again suppose a traveler enters a tavern which he has a right to do without knocking and then commits an unlawful act as breaking the furniture or stealing the Landlords money he becomes a trespasser ab initio for his right to enter the house was a right given by law which he has abused (same auth)

But the subsequent abuse must to make one a trespasser by relation be a positive tort and not a mere non-feasance as in the case of a traveler coming into an Inn his refusing to pay is still a case being a mere non-feasance would not make him a trespasser ab initio 5 Bac. 161. & Co 146. 2 Bulst 312.

Hence if one having distrained Cattle suffer them to die run away or be injured in any way by his neglect he is not a trespasser ab initio but if one having distrained cattle injure them by any act as by whipping them or killing or selling them he is a trespasser by relation 2 Roll 565. 1 Roll. R. 130.

But if a Sheriff having seized goods on mere process which by law it is returnable neglects to return it he it is said is a trespasser ab initio or by relation. This rule perplexes weak heads by being seemingly contradictory to the one above. 2 Roll 563. 5 Bac 152. Salk 409. Ld Ray 632.

The rule is undoubtedly correct but the doctrine of relation dont apply to it at all. The true reason of the rule is that if he has not returned the process. The process is no evidence so that the original taking cant be proved to have been under the authority of law, and if the original taking was unlawful it is of course a trespass

There then are cases where the Law authorizes the original act but on the other and when the authority to do the original act is given by one of the parties (as the Sheriff) he can not make the person to whom the authority is given (as the Bailiff) liable as a trespasser ab initio for any subsequent abuse of that authority as if I license a person

to enter my house and he entering in pursuance of it abuses it by beating my servants &c, for this act I can not make him a trespasser by relation for the first entry. 2 Roll 56. 8 Co. 146. Ayels 96-7.

Why this diversity? The reason is the law will punish a person for abusing an authority which is given by it but where the party complaining gives the license he can with no propriety say the Deft is a trespasser for doing that which he gave him leave to do. but still the Deft is liable for his subsequent unlawful act in an action on the Case

There is one class of cases which appear inconsistent with the last rule and those are where a bailee (as a depositary) destroys the goods bailed he is a trespasser. but is he a trespasser ab initio? I think not though some books countenance that opinion but for the act of destroying he is a trespasser Litt sec 71. 1 Inst 57a 5 Coke 13b 5 Bac 266.

But to maintain this action the Plff. must have had possession of the property injured at the time of the injury. property alone is not sufficient the reason is this action is the appropriate one and adapted only to injuries done to the plaintiffs possession as if the Plffs bailee uses the goods bailed he cant maintain trespass for his possession has not been injured. Trover would be the proper action in this case 4 T R 489. Esp Dig 384. 7 J R. 9.

A let a house to B. already furnished for two years. the Sheriff on an execution against B took the furniture A brought an action of trespass against the Sheriff and it was held not to lie for he had no actual or constructive possession of the furniture at the time of the taking.

But as against a Stranger a constructive possession (which is the right of present possession) is sufficient to entitle him to maint. this action Thus as against his bailee he has no constructive possession for the bailee has a rightful possession and of course the bailor as to the bailee can not have the the rightful possession otherwise their rights would be inconsistent but as against a stranger who has wrongfully taken the goods bailed from the bailee he has a constructive possession for has the right of immediate possession from his depositary on demand from a common carrier on paying him for carrying &c. 2 Roll 5-6. 5 Bac 164. 1 T R 480. 4 do 489. 7 do. 9.

And any person who has the general property may maintain this action for a general property in personal chattels draws after it the possession in Law. 5 Bac 164 Latch 214. 2 Bulst 264. 1 Sid 438. 2 Roll 559.

The general property must suppose a right either absolute or conditional of present possession. If a man has goods in the hands of a carrier still he has a conditional right of present possession for paying him for his carriage he has a right to possession he may therefore maintain this action against a stranger who shall take the goods from the carrier 4 T R 489. Palm 480. Lev 3. 383.

On the other hand he who has the special property in goods accompanied with actual possession may maintain trespass against a stranger for an injury to that possession and according to some opinions against the owner himself. 1 Mod 89. 4 Mo 84. 2 Roll 551. 559. 5 Bac 164. 2 Saund 47.

As a general rule he who has the general property or he who has the special property with possession can maintain this action a bailee can not maintain it against his bailor 5 Bac 164. 175.

If property is sold or given to another so as to transfer the interest the latter may maintain this action against strangers for an injury to it before he has taken actual possession for the general property draws after it the possession as against strangers Latch 214. 5 Bac 164.

If the goods of a deceased testator are taken away by a wrong doer the executor may after proving the will maintain this action for the executors authority is given by the will and not by the probate of it though the probate is indispensible evidence of his authority. 2 Bulst 264. 1 T R 480. 5 Bac 164.

A Legatee of specific goods may also in such a case after the executor has consented to the legacy maintain the action for it is the will which gives the legacy although the Executors consent is necessary as evidence of his right under the will 5 Bac 164. In this state the consent of the executor is not necessary to vest the goods in the legatee but it is in england 5 Bac 164.

But if a legacy is given of a certain part of the testators goods as 1/3 without designating any particular articles such consent of the executor would not entitle the legatee to maintain this action in such a case as the above 1 T R 480.

If trespass is brought for taking the goods of two or more persons all should join in the action but the nonjoinder can be taken advantage of only by a plea in abatement Salk 31. 3 Lev 354. Litt sec 323. Sho 420. Lep D 5 486.

At C. L. this action dont lie for an act of trespass amounting
to a felony for say the books the civil injury is merged in
the felony. Why merged? The reason I suppose is this by C. L. a
felony works a forfeiture of all the property of the felon and
the right of the crown is paramount to that of an individual
when both accrue at the same time and as his property
is forfeited so also is his person so that there can be no
civil action against him 5 Bac 176. 1 Lev 21. 47. Yelv 90.
1 Mod 283. Latch 144. Stra 873. Ld Ray 1572. 3 T R 176. Bul 131.
In this state the felons goods are not forfeited and therefore
a civil action will lie.

(142) In declaring in this action the [illegible] describes them with
convenient certainty the allegation of divers goods is certain
goods is not sufficient and it is said the want of sufficient cer-
tainty in this respect will not be cured by a verdict the reason
is if the goods are not described the Deft can not justify by sho-
wing his right to take the particular and besides it would be no
bar to a second action for the same goods if it did not appear
from the record for what the recovery was had Ld Ray 1410.
4 Bur 2455. Wils 637. 5 Coke 35 Esp 405-6
This rule holds only where the action is founded on the taking
or injuring of the goods for where that is only laid in aggravation
of damages as if an action is brought breaking and entering
the Pltffs house and an injury to his goods is laid in aggravation
of damages it is enough to allege generally an injury to the
Pltffs goods 3 Wils 292. Esp 406. 3 T R 292. 1 H Bl 555.
Here the breaking and entering the house is the gist of the action and
a justification of that act will be a justification of the whole trespass
so that if the Pltff wishes to recover for the injury done to his goods
he must do it under a novel assignment (sic) he must new assign
the injury done to the goods and there he must describe them par-
ticularly. 1 B & P 230. 3 T R 292. 2 H. Bl 555. 1 Vent 211. 217. 2 Wils 313.
3 Wils 20.
Again a general description of the goods may be sufficient if it can be made
certain by refference to some other part of the declaration. Salk
643. 1 Vent 114.
The Pltff must always state his possession of the goods at the time
on which the trespass was committed on them in some form
or other. This may be done by alledging actual possession or such
a property, as shows a right of present possession at the
time the injury was done to them Salk 640. Cro Jam 46. 4 T R.
490. 1 do 480. 2 Lev 136. Esp 400. 383.
The value of the goods must be stated in the Declaration but the
want of such statement is not a radical defect for it
will be presumed after a verdict that the value was proved to
the jury. 5 Bac 196. 1 Sid 39. Cro Jam 129. 2 Vent 174. 4 Bur 2455.

Trespass to Personal Property.

The pendency of another action against the same Deft by the same Plff or the same trespass is a good plea in abatement but not in bar except there has been a recovery in the prior action 5 Co 61. 1 Bac 13. Barth 91.

But it is no defence in abatement that the Plff has another action depending against another Deft for the same trespass but the Plff can recover his damages but once tho may recover his cost in all the actions Hob 134. Stra 420. 4 Bac 48-9.

The Plff must alledge a day on which the trespass was committed but he is not confined in his proof to the day alledged, or if he proves a trespass committed at any time before the commencement of the action provided it is not barred by Statute of limitations it is sufficient to entitle him to recover Esp 407. 415. But 17. 2d Ray 231. Stra 32. Co Litt 283.

Hence if the Deft plead a release he must plead it with an absque hoc that he is guilty of any trespass since the release or will not cover the whole time in Declaration So if he plead a license he must traverse that he committed any other trespass at any other time so if he pleads that the goods on which the trespass was committed were transferred to him he must traverse that he was guilty before the assignment But I think the most Lawyer-like mode of pleading in such cases would be to plead the release licence or assignment in one plea and then go to all other trespasses plead the general issue in another plea Hob 104. Esp 415.

The Plff may alledge in his Declaration any fact for which he could not have a seperate action and this may be done it is said for the purpose of encreasing the damages. I think it is for the purpose of showing the manner in which the trespass was committed as that it was forcible and malicious but these circumstances would undoubtedly have the effect of increasing the damages Salk 11. 1 Stra or Stra 61. 1 Ld Ray 787. Salk 642. Ld Ray 1032.

Where the trespass was committed by several jointly the Plff may sue one alone or all in one declaration or he may bring seperate actions against all or any number of them Stra 4 L.R. 3 Bac 192-3.

But it is said that if it appear from the face a declaration against one that the trespass was committed by two or more they must be joined or the declaration will be bad. Hob 199. 1 Leon 41. 3 Bac 192-3. I can see no reason for this rule and cant think how for if the non joinder was pleaded in bar it could have no effect Stra 420.

If the Plff recovers Judgt against two or more and levies his execution and collects the debt of one that one can never compell the others to contribute for the law raises no promises in favour of joint trespassers Hardres 164. 2 Ld Ray 186.

If the Deft relies on a justification he must plead it specially and cannot give it in evidence under the general issue for it is inconsistent with it 1 Bull 242. Stra 61. Esp 411.

If in an action against two or more one of them pleads a justification which shows the Plff had no cause of action against against either of them he cannot have judgt. against either of them even if the others have suffered a nonsuit or pleaded the general issue which has been tried and found against them
Hob 66. Hob 67. Esp 421. Ld Ray 1372.
By the C.L. rule of pleading every trespass must be laid to have been done with force and arms and against the peace and the omission of them at C.L. would be incurable even by a verdict the person if the Deft is taken by a criminal capias from the King for a breach of the peace and imprisoned but in all other civil actions the judgt is that the Deft be in misericordia 4 Bac A.
& Co 39. 5 Bac 191. Salk 636. Cro Jam 443. 526. 536.
Now indeed the statute of 5 Wm & M. takes away the criminal capias but the Plff pays the fine for the breach of the peace in the first instance and recovers it back of the Deft so that the reason is as good now as ever for using the words for the Plff need not pay any fine unless the action sounds in trespass 5 Bac 191. Salk 636 contra Ld Ray. 985. but not law.
As I have before observed the words contra pacem at C.L. are of the substance of this action Carth 66. Salk 636 Cro Jac 443. 526. Esp 404.
But now the omission of both these allegations are aided by the statutes of Jeofails after verdict 1 Bac 934. Salk 640. Esp 404.
In our practice the words are regarded as mere form for the C.L. reason does not exist here.
I would observe however that though we disregard the words yet we keep up the distinction between actions of trespass and case
It follows as a consequence from the preceding rules that trespass and case cant be joined in one declaration (e.g.) a count for taking goods cant be joined in the same declaration with a count in Slander & Co. 39.

End

Of trespass to personal property.

The Action of Replevin

Replevin

Replevin is the redelivery of goods to the owner by legal process which have been distrained from such owner. This takes place only on security given that the owner shall try the right of the distrainor and shall redeliver the goods to the distrainor if the right is found against him

The word replevin denotes a redeliver the action of replevin is one by which the redelivery is effected

It becomes necessary to enquire what is meant by the term distress It is the taking of a personal chattel out of the possession of the wrong doer into the custody of the person injured to procure a satisfaction for the wrong, committed this is one of the methods by which the party injured is allowed to redress his own wrong 3 Bl 6. 1 Inst 145. 4 Bac 372. Esp 346.

But though the term properly signifies the act of the party in taking the property, still it is frequently used to signify the article or thing distrained

By the term wrongdoer in definition is not necessarily meant a tort feasor but it includes those who are in mere default in not paying debts or duties

This action of replevin will not lie for goods taken by a mere trespassing act for it lies only for goods distrained (e.g.) If I take away your cloak you may maintain trespass but if I take it claiming it as a distress you may bring replevin Bul 53. 3 Bl 146.

This writ is never granted only on security given by the person who wishes to make replevin that he will try the right of the distrainor and if it is found against him that he will return the goods to the distrainor Esp 347-8 1 Inst 145. 3 Bl 13. 147.

In Cont the security is an entire substitute [illegible] the [illegible] that the [illegible] shall try the [illegible] as he is here called [illegible] himself that the [illegible] shall try the right and if it is found against him he will [illegible] the damages done [illegible]

(143.) If the Plf does not try the right or on the trial fails in establishing his right the property replevied is to be restored to the distrainor and for this purpose he may have the writ de retorno habendo and after the return of the property he (the distrainor) can hold it untill tender of amends and no longer for he holds it then only as security for the payment of the debt duty or damages 1 Inst 145. 3 Bl 147. 155. 8 Co 147.

But all the right the distrainor has to the goods on having them returned is to detain them until the debt is paid, the debt or damages for which they were distrained.

If the owner distrained upon tenders sufficient amends before the distress the distress itself will be unlawful if he does it after distress taken but before impounding a subsequent impounding will be unlawful so if the judgt. de retorno habendo is rendered but the Plff tenders amends the distress need not be returned for the distrainor can have the goods only as security. 8 Co 147. Bul N.P. 5 [illegible] 2 Roll 561. Esp 357.

When a distress is taken it must by the C.L. be impounded if it consist of inanimate chattels it should be impounded in a pound covert but if of animate chattels in a pound overt. In Connt. we have no such thing as a pound covert. 3 Bl 12. 1 Inst 47.

By C.L. the distrainor could never sell the distress but only keep it untill the injury or debt was satisfied but by statute in case of a distress for rent the evil is remedied by allowing a sale but a distress damage feasant cannot be sold 3 Bl 10. 13. 1 Bac 588. 8 Co 41. 12 Mod 330.

The writ of replevin is a C.L. right and a person cannot by any any agreet. bar himself of that right such an agreet. being void 1 Inst 145. 4 Bac 373.

I have observed the writ of replevin lies to recover goods which have been distrained now the cases in which a distress may be made are principally two 1st. Where cattle are taken damage feasant on the land of another they may be distrained 2d. A distress may be made by a landlord on his tenant for nonpayment of rent and for this cause he may distrain any goods found on the demised premises though they were left there by a stranger only for an hour 3 Bl 7. 1 Inst 46. Esp 354. 355.

These two are the most usual but not the only cases of a distress a person may be distrained upon for amercements and feudal services non attendance on the lords court Heriots &c. (same auth.)

This writ may be brought at C.L. by suing a writ out of Chancery or by the statute of marlbridge 52 Hen 3 the Sheriff may replevy by his own process and it seems the sheriff may by parol order his deputy to distrain Esp 346 7. Fitzh 169.

A writ of replevin lies in all cases of distress except where goods are distrained by a capias in withernam, this is a distress made by the [illegible] has distrained and [illegible] distrained when on the [illegible] cannot be replevied 3 Bl 147. [illegible] Fitzh 69. 73. the distress so that it cannot

When the writ de retorno habendo is awarded if the distress cannot be found an action lies against the [illegible] or [illegible] in the writ of replevin he may have scire facias or any other proper process against bail 4 Bac 382 [illegible] 322. 2 [illegible] 41. Esp 347.

In Cont. the writ of replevin lies only where cattle have been distrained damage feasant and where cattle or goods have been attached on mene process stat Con 574.

1 Where Cattle have been distrained damage feasant.

In this case the owner of the land on which the cattle were doing damage has his election to bring trespass quare Clausum fregit or distrain the cattle damage feasant but if he elects one he can not relinquish it and pursue the other and if he elects to distrain and the distress escapes for any fault of his he cannot have trespass so if the distress die by his neglect or fault but the distress escapes or dies without any fault of his he may have trespass 5 Bac 179. 12 Mod 658. 663. Ld Ray 720. Salk 243.

At C.L. this writ issued in this case out of chancery but now by the statute 52 Hen 3 the Sheriff may replevy by his own process 3 Bl 147. 13 Co. 31. 4 Bac 373.

There is a strict analogy between a distress and the body of a debtor taken in execution for if the body in execution escapes without the fault of the creditor his debt remains so of a distress so if a person in execution dies the debt remains so if the distress dies but if the body of a debtor is released by the creditor the debt is extinguished so if a distress is released by distrainor 2 Bac 354. 5 do. 179. 12 Mod 663.

By a statute of Cont. when cattle are impounded the owner not only may have replevin but must replevy or release them in some way within 24 hours (after notice) or he incurs a daily forfeiture for each animal Stat Con 555-6.

These forfeitures are determined by a Justice of the peace same stat)

In England the owner must provide for his beasts impounded if they are in a pound overt but need not if they are in a pound covert. 3 Bl 13. 1 Inst 47.

In Cont. when Judgt. is given for the Deft it is for his damage and not that there be a return of the distress Stat Con 555.

And if the execution is not satisfied the bondsmen or pledges are liable even if the Plff in replevin has been taken in execution imprisoned and discharged from prison it dont discharge the bondsmen

By our statute the action of Replevin is in form an action of trespass still the object of it is not to recover damage but to [illegible] the cattle but if the cattle were unlawfully [illegible] distrained the Plff may claim damages

In Cont. if the owner of the cattle is not known the distrainor must post them &c see the stat 555.

When the cattle of one man enter on the land of another through the insufficiency of the fence of the owner of the land the owner of the cattle is not liable for the damage done but if the fence is in some parts good and in some bad and the cattle break through the good part they may be distrained for [illegible] in [illegible] and the very fact that they broke through the sufficient part proves them [illegible].

If one man's cattle enter on another's land from the highway it is immaterial at C.L. whether the fence is good or bad or whether there is any at all for it is at common law unlawful to let cattle go on the highway. 2 Vr. Bl 527.

In Conn^t. neat cattle and sheep [illegible] are commonable but I think not unless by vote of the [illegible] if they are so made commonable and break from the highway into anothers field I think they cannot be impounded unless the fence was sufficient. It has been so decided by S. C in N London County. Stat Con 193. 3 d C. 2 C R. 557.

It has been a disputed question but in the above case it was decided that the only effect of the statute permitting towns to make cattle commonable was to prevent cattle from being impounded for merely going on the highway.

The general principle which governs the liability of the owners of animals for mischief done by them is this For the mischief done by animals from a disposition common to their species the owner is liable without any previous notice of their propensity as the owner of a bear but on the other hand where mischief is done by animals whose disposition to do such injuries is not common to their species the owner is not liable unless he has previous notice of their disposition or propensity to do mischief as the owner of a dog who bites a man is not liable unless he had notice of his disposition for it is not the disposition of dogs in general to bite mankind 2d Ray 606. Esp 601. Dyer 25. 29.

Hence a man is liable when his cattle destroys his neighbours grass and herbage crops &c without notice of their propensity for it is common to the whole species of cattle to eat grass &c

The distrainer of an animal is not allowed to use [illegible] and if he does he is liable as a trespasser ab initio 3 Bl 13. Cro Jam 148.

Upon the trial of a writ of replevin the Deft may either deny the taking or he may acknowledge the taking and justify by shewing his right to take 4 Bac 388.

On our writ to replevy goods attached on mesne process there is no trial

The general issue in replevin is non cepit On this issue the Deft [illegible] claim the property distrained as his own. The reason is said to be that such evidence would be inconsistent with his plea. Bul 54. Salk 5 2 Lev 92. 6 Mod 81.

If the Deft justifies he is called the avowant and his plea is called an avowry provided he justifies in his own right or in right of his wife but if he justifies as servant or bailiff of another then his plea is called a cognizance 3 Bl 150. 2 Saund 195. Esp 360.

And although every avowry is in the nature of a plea still it is in the nature of a declaration and the replication or answer to it is called a plea

There is one peculiarity in this action viz. that both the parties are actors when the Deft justifies The owner of the distress goes

for damages for the taking it the Deft or distrainor goes for a return of the distress at C.L. but in this state for his damages 2 Mod 149. Cro Eliz 798. Bul 61. 3 Bl 150-1.

In our action of replevin the Plff and Deft both claim damages the in many of in the nature of a declaration in debt respects 1st The distrainant claims damages as the Plff in a declaration does 2d The Plff may plead in abatement & an avowry which he can never do to a plea 3d The avowry concludes as a declaration dare demanding damages and not with a verification it is therefore similar to a declaration in its nature and incidents 2 Will 11 Stall 95. 4 Bac 373. Dyk 376-7. Carth 122. 6 Mod 105.

It has been a disputed question whether one tenant in common may avow without his companion or tenement Think he cannot for they have both a right to the damages but one may avow if he makes cognizance as bailiff of his companion in right of his co-tenant Cro Eliz 530. Dyk 37 b. 4 Bac 373. 2 Y. Bl 386. 1 Roll 220

But where two tenants in common are sued in replevin they may make several avowries and not bound to join in one 2 Y. Bl 384. Cas te 346. Carth 389. Ld Ray 422.

As the title to the land where the cattle were distrained may come in question the Plff may deny the right the Deft had to take the distress when he did take it. The action of replevin has therefore sometimes been called a real action but it now settled that it is a personal action only. and I think very correctly the true distinction between a personal and real action is that a real action is one in which the realty is itself recovered a personal action is one where personal property only can be recovered by the Pltff. title to land frequently comes collaterally in question in the action of Trespass quare clausum fregit but no one ever thought of calling it a real action on that account Carth 97. 478 6. Finch L. 316. 4 Bac 373.

(144) All distresses must be taken in the day time except beasts damage feasant which may be distrained in the night because otherwise they might escape and besides if they were left with morning they might do great damage 3 Bl 11. 1 Inst 142. 161. Lit. S. 360.

The object of this rule is to prevent abuse by a person seizing their own remedy in the night season

A distress of cattle must be made while the cattle are on the land damage feasant and if the owner of the land permit them to go off he cannot distrain them 1 Inst 142. 9 Co 22.

The rule formerly was the same in distresses for rent so that goods could not be distrained for rent unless they

were on the demised premises or taken on fresh pursuit when they were carried away 3 Bl. 11.

In case of a distress for rent the landlord might take a 6. L. as large a distress as he pleased but by the statute of Marlbridge 52 Hen 3d an action on the case is given for an excessive distress 3 Lev 4 K. 1 Vent 104. Show 251. 1 Bur 590.

Trespass however will not lie for this injury except when gold or silver of a certain known value is distrained and then trespass lies for the excessive distress 1 Bur 590.

The right of distraining for rent is incident of common right only in cases where the landlord or person distraining has the reversion of the leased premises otherwise his only remedy is by action and not by distress. Litt sec. 215-K. 1 Inst 142-3. Co 1 355-6. 2 Bl 42.

A right of distress may have been reserved in the latter case (i.e.) where he has not the right of reversion and then though he has not the right to distrain incident of common right still a distress may be made by virtue of the reservation in the deed (same auth)

By 4 Geo. 2d the right of distress is extended to all rents whether the landlord has the reversion or not 2 Bl 43. 3 Bi 6. Co 1 355-6.

In the action of replevin if the Deft prevails he has the writ "de retorno habendo" but now by the statute 17 G. 2d if the Deft prevails he recovers his costs and so much in damages as are of the value of the distress if the value of it ~~exceeds~~ does not exceed the rent and if it does exceed the rent he recovers the value of the rent and his costs. This is much the same as our law And by this statute if the distress is not large enough to satisfy the rent the Deft may make another 3 Bl. 150. 3 T R 349. 2 H. Bl. 36. 2 Wils 116. 1 Bul 5 K.

Under our statute when goods are attached on mesne process and replevied there is no trial for it is not an adversary suit for they are replevied out of the custody of the law merely to await the event of the former suit Kir 274. 2 Dessiff. 95.

In this State the writ of replevin is a mandatory, directed to some officer commanding him &c.

The goods are restored to the Deft ~~on the Plff~~ in the original

suit on his giving security to respond the damage
but on this writ of replevin there is no trial (Stat Con title
Replevin) for the taking cant be unlawful if done under
legal process and if it is not so done trespass or Trover
is the proper remedy.

The bond is a mere substitute for the goods.

In this action it is not usual to charge a Trespass
This writ as has been settled by the Supreme court must
be directed to the officer who made the attachment 2 Kirby 276.
The writ is to be returned to the court where the suit
on which they were attached is commenced the
Bond is to the Deft (in this action) and is to be returned
to the same court Stat Con 24. 2 Swift 93.

But the writ for goods attached on mesne process is now
in a great measure superseded by officers not unfrequently taking
a receipt of some third person for the goods so attached

This receiptsman or bondsman becomes liable for the whole
debt if he dont return the goods to respond the Judgment
so in the writ of replevin the bondsman becomes liable for
the whole amount of the Judgment though the goods dont amount
to half the sum 1 T R 24. 1 H Bl. 76. Cowp 71. 2 H Bl. 36. Esp 344.
Doug 336. 4 D R 433. Contra 2 H Bl. 517.

As the Sheriff is liable in england for taking insufficient
bail so the magistrate here is liable but not where he takes
pledges which are apparently sufficient at the time
and he is liable without suing the pledges if they are proved
insolvent. The rule as to Sheriffs is the same in england
In england the bond must be double the amount of
the debt Bull. 60. 2 H Bl. 36.

It has been made a question in this state whether the magistrate
may take the Offs own bond. It is now settled that the bond
of the Off is not sufficient in any case. It is surprising to
me that it ever was held otherwise I should think the writ
in such a case must abate 1 Root 165.

It has also been a question when property to a small
amount has been replevied whether the bondsman is
liable for the whole debt. It has been held in the case of
a receiptsman in such a case that he is liable for the whole
debt. So our statute expressly provides Stat Con Replevin
This also appears to be the english law

If the property of one person is distrained for the debt
of another Replevin is not the proper action but the
remedy of the true owner is an action of trespass

because no one can replevy unless he is a party to the former suit besides replevin does not lie for a mere trespassing act. the meaning of this last clause is that the taking must have been under the form of a distress, or replevin against the party replevying will not lie for a mere tortious taking without colour of law trespass or trover is the proper remedy Kirby 276. 2 Swift 93. Bul 53. 1 Just 145. 3 Bl. 13. 146. 147.

If Cattle or goods belonging to a feme sole a distrained and afterwards she marries the husband alone may replevy them the principle on which this rule is founded is that all the personal property of the feme is by the marriage vested in the husband provided he had the possession either actual or constructive and in this case he has a constructive possession for he had the right of possession on paying the damages for which the distress was taken and the distress does not reduces his right to a mere right of action 1 Sid 81-2. Bul 53. Esp 375.

If however the wife should join in replevin and a verdict should be found for both the verdict aids the joinder in the declaration (some auth)

If the owner of goods which have been distrained dies the action of replevin may be brought by the executor or administrator and not by the heir at law 1 Sid 81-2. Bul 53. Esp 375.

If the several goods of several different persons are distrained together they can not join in replevin for their interests and rights are several and not joint 1 Just 145. Bul 53. Esp 374.

If goods distrained in a foreign country should be brought here they can not be replevied here because (it is said) the caption may have been lawful by the laws of the foreign country 2 Show 71. Esp 373.
The reason of this rule is not a good one for in other cases evidence will be received of what law of the foreign country is the true reason appears to me to be that the cause of action in distress is locale and must be tried in the county where the distress was taken—

The action of replevin lies for things personal only the reason is things real cannot be impounded (e.g.) a house cannot be distrained and if corn cannot be impounded for this reason (it is said) replevin will not lie for a load of hay land but the true reason I think is a load of any kind can not be distrained if it should be the right or

Replevin

Trover would be the proper action I think Replevin would not lie for lands for the same reason Esp. 372. Tr. Ed. 64.
It is a rule that replevin is founded on the right (or) on the property of the Plff in replevin as contradistinguished from trespass or trover which are founded on the possession of the Plff. hence in this action it is a good plea in abatement or bar that the property of the chattels is in a stranger and it is no answer for the Plff to say that he was in possession at the time of the distress made this is a good rule and is I think as it ought to be 4 Bac 373.
2 Lev 92. Barth 74. 243. Salk 94. Bul 53.

Ejectment

Of Replevin Dec 30th 1820

Case

(145) Action on the Case arising Ex Delicto.

Trial now of the action on the Case only when it is founded on a tort or wrong and not of the action on the Case which is founded on a Contract for this will be treated of under the title Assumpsit

This action lies in three cases

1st For wrongful acts not accompanied with force

2d For Culpable neglects or omissions

3d For consequential injuries arising from forcible acts.

1 First for wrongful acts not accompanied with force These are Slander Trover and malicious Prosecution which have been treated of

2 It lies for culpable neglects or omissions. Under this head are included neglects of bailees and servants by which their bailors or masters are injured neglects of officers by which the creditor is injured. These have been treated of under the titles Bailment The Sheriff & Gaolers &c.

3 It lies for such injuries as are in themselves a trespass to some one but to the Plff in this action are merely injurious in their consequences and then the injury must be laid with a per quod Such is the injury which a man sustains by the battery of his wife Child or servant so as to deprive him of his service Such also is the injury occasioned by the blocking up the highway and nuisances in general 1 Ra 636.

The English action by the master for an injury to his servant by which he lost his service is an action of Trespass but on principle it ought to be Case 2 Bl 167. And in this state they always bring Case for such injuries

This action is founded on the statute Westminster 2d 13 Edward 1st

For an escape it appears this action on the case lies at Law but it is generly founded on the statute Westm. 2d. 2 Bl. 54-2. 123. 2 T R 129.

3 Reeve H. E. L. 89. 243. 3 Bl 51-2. 123. 2 T R 129.

In Court the forms of declaring make an action when founded on a contract to be case but when founded on a tort it is called Trespass on the case

This distinction is unknown to the English Law.

3 Bl 164. 3 Reeve H. E. L. 245. 394.

If Trespass is brought where case ought to have been the Declaration is radically defective and incurable and so "e converso" 6 T R 125. 2 Mod 1. 51. bro 62 141 or 196.

Trespass or Case

This rule is founded on the diversity of the C.L. Judgments where the injury is a forcible one (i.e.) a trespass the judgment is a capias pro fine but where the injury is not a forcible one the Judgment is a misericordia so that in case of a mistake no judgment can be rendered 5 Bac. 191-3. 4 Sall.

But it has been a subject of much controversy in what particular cases trespass or case lies. It is agreed that when the injury is forcible trespass is the proper remedy where the grievance is not the force no doubt but the action on the case is the proper remedy but where the original act occasioning the injury is committed with force sometimes trespass is the proper action and sometimes case

It is frequently difficult to determine in the first case when the action ought to be trespass and when case on this subject I lay down the following rules.

1 It is a general rule that where the forcible act is immediately and necessarily productive of the injury trespass and not case is the remedy

2 But if the injury is in consequence only of the forcible act an action on the case ought to be for the consequential injury trespass or the case is the proper action.

In speaking of cases where the original act occasioning the injury is forcible and not of cases where the original act was not forcible perhaps the latter case than can be no doubt but case is the proper remedy. If one forcibly raising an obstruction in the highway 2. is another the injury is forcible and the remedy is trespass if so qr for the act of raising the obstruction But if after it is raised one leaping by sails over it the remedy for this injury is case No case is always the proper remedy where a master sues for an injury to his servant but if the servant sues for the injury his remedy trespass or case according as the injury is forcible and immediate or not 3 Bl. 208-9. 6 T R 123. 125. 153-4. 3 T R 648. 2 Bl. R 1055. 2 Wils 313. Bul 26-79. 2 Bl R 892.

The above rules are undoubtedly true as general rules but great difficulty frequently occurs in applying these rules to particular cases for to maintain trespass it is not necessary that the injury should have been the instantaneous effect of the force for if the original act is forcible the remedy for an injury flowing from it is sometimes trespass and sometimes case

1 Where the immediate or proximate cause of the injury is but a continuance of the forcible act the remedy

Case ex delicto

is Trespass for the injury is the immediate consequence of force and he who gave the original force is deemed the author of the whole force If A puts an instrument in motion which B to defend himself from injury wards off thereby giving it a new motion and direction after which it hits C. A is liable in trespass but if after the motion given by A had ceased B had wantonly given it a new motion A would not be liable in trespass for there was no continuation of As. force

But when the original force ceases before the damage commences the injury is consequential and the remedy if any is Case The reason is the force which caused the injury is not his actual force. The case will always come within this rule when the injury is committed by the intervening voluntary act of an intermediate voluntary agent

These two rules are to explain the application of the two former general rules to particular cases

This distinction between trespass and Case is very nice and very important to be observed the cases to illustrate this distinction follow

A. discharges a ball from a gun which meets some object and glances and hits B. here Trespass is the proper remedy for the force given by the object is a mere continuation of the force given by A.

A. kicks a foot ball after it has bounded and rebounded ten times (for instance) it hits B. or breaks his windows here Trespass is the proper remedy for it is but a continuation of the original force

But on the other hand if A kicks a foot ball and B afterwards voluntarily kicks it and it hits C the injury is B's. and he is liable in Trespass But if A is liable at all it is in Case because As kicking the Ball was lawful and the mere force given was by the voluntary act of B. so it was not A's force.

Again A shoots a ball from a gun which after glancing ten times hits the servant of B. here if the servant dies it would be in trespass because as to him the injury is immediate and forcible But the masters remedy is Case for his injury (i.e) for his loss of service because

this is a mere consequence of the forcible act which is the causa causata 2 T R 167-8. Salk 206. Ld Ray 274. 831. 3 Wils 18 2 New R 346-7. 476.

Again A throws a log into the highway and hits B the remedy is trespass for the force that hurts B is but a continuation of A's force But supose B breaks his limbs or his Carriage by driving over the log now case is the proper remedy for A's force in throwing the log had ceased when the injury happened 5 T R 641. 3 Wm 636.

Suppose A throws a log into the street B afterwards rolls it out and in doing it rolls it against C. the remedy against B (if any) is trespass but if the action is brought against A it must be in Case for there is no continuance of A's force

In the case of Shepherd and Scot the third person who threw the squibs were not considered as voluntary agents it was on that ground the majority of the Court went in their decision if the third person had as voluntary agents given a new direction to the squibs the action against Pict if any could have been maintained must have been Case

Where a person turns out a wild ox which injures a person here the injury is done by force there is a continuance of the force and the ox is the involuntary agent by means of which the force is continued 1 Ray 467. 1 Mod 24. 3 East 593.

In the last case there is no intervening voluntary agent who gives a new direction to the force for the ox is an involuntary one 6 to Jam 446.

Again. if A erects a Spout on his own land which throws water on the land of his neighbour by reason of the rain falling in this Case is the proper remedy here the force of erecting the Spout (if any) had ceased, it is the force of the rain that caused the injury the erecting the Spout is the causa causata On similar principles depends the case of erecting a dam on ones own land which causes the water to rise and overflow his neighbours The matter is in these cases there is no force in contemplation of Law Stra 636.

But if A cuts down a dam or mound on his own land and lets the water flow on to B's. B's remedy against A is by the action of trespass for here there is an immediate forcible act which puts the water in motion and the flowing of the water by the force of gravitation is but a continuation of the original force the same as if he had thrown the water by a pump.

A man rode an unruly Horse into Lincons Inn Fields a place to which many people resorted the Horse took freight ran over and injured a man for this injury it was held the proper remedy was Case because the injury arose from his negligence in riding the horse to such a place. The injury was occasioned by the distinct act of the horse and not by the rider and negligent acts must be voluntary to maintain trespass though it is not necessary that the injury should be voluntary for 2 Vent 295. 2 Bl R 899.

There is one case where a person drove his carriage against another mans and for this injury undoubtedly the proper remedy is Trespass but it was held Case would lay but the reason why it was so held was that the declaration was so framed that it did not appear to be the act of the person driving for it did not appear from the declaration that he was in the carriage at the time the injury happened 2 Sau R. 117. 3 East 593. 8 T R 188.

If A discharges a gun and the fire of the wadding communicates to B's property as his barn and consumes it it was held that Case was the proper remedy against A Cro Eliz 10. This decision I think is correct for A's force ends when the wad fell and then commences the burning a distinct force and not a continuance of the origional force. Yet if A discharges a gun into the Barn of B for the express purpose of setting it on fire Trespass is the remedy. but how it may asked can this be reconciled with the doctrine that it makes no difference whether the injury was voluntary or involuntary? I answer thus where he intended to set the barn on fire it is his act but if there was no intention it cannot be said to be his act but the act of the fire. this is the distinction for it must be the act of the person doing it and it is not his act but the act of the fire if he did not intend it but where he should a gun with the intention to set fire to the barn it is as much his force as if he held a candle to it and set it on fire but where there is no such intention it is the force of the fire and not his force

(146.) If I dig a trench on my own land and thereby divert the water course from my neighbor's land the remedy is case for there is no continuation of the force to the time of the injury 2 Wils 174. Stra 5. 638. 4. ... 638.

If a servant does another a forcible injury the remedy against him is Trespass but against the master the remedy is Case for the act of the servant is not the act of the master and the master is not liable as for the act but on the score of neglect in not employing skillful and careful servants 1 B & P. 472. 6 TR. 125. 2 H. Bl 442. Salk 441. 5 TR 649. 1 East 106.

You will perceive that the rule in the above instance is not contradictory to the general Rule [illegible] 1183, 7 TR 279. 5 Bur 2795.

In a late case the master of a Ship run it down on the Deft Boat. the Ship owner was held liable for the injury in Case 2 New R 446.

Critical distinction. It is agreed that if one run a Ship willfully against another Ship he is liable in Trespass but it is said if one run a ship negligently against another he is liable in Case why this distinction? The form of the action dont depend on the willfulness or negligence of the injury the Court (it is said) did not consider it as the act of the Deft. But I cant see the force of this reason The reason I suppose is that the running down was not the act of the master but by the neglect of some of the Crew who were the servants of the master and for injuries by a servant the master is liable only in Case 4 TR. 188. 3 East 593.

From analogy to other cases if the injury was caused by the neglect of the master he is liable in trespass for the driver of a carriage who by negligence runs against another carriage the driver is liable in trespass 2 Campb 464.

There are many cases where the injury is accidental and still the person causing it is liable in trespass the reason is it is a forcible injury and the whole force is the Defts.

But where one erects a spout the falling of the rain is not the force of the Deft yet if one cuts down a dam of water and lets it run onto his neighbors land he is liable in trespass for here it is the Defts force (Quere in my mind)

Where Case lies for an injury arising in consequence of an act done with force the act may be laid to have been done vi et armis this will not make it an action of trespass because that is a mere inducement (e.g.) I sue a man for beating my servant I may lay the battery to have been done vi et armis to my servant 3 Reeves H. E. L. 244.

Whether the original act was lawful or not is no criterion to determine whether trespass or Case is the proper remedy but the question in such cases is whether there is any immediate forcible injury 2 Bl R 892. 3 Wils 403.

Whether lawful or not may be of some service in determining whether any action will lie but not to designate the action

Case ex delicto

For what injuries does Case lie?

The action on the case covers more legal ground than any other action

1 In the first place it lies for misfeasances as well as non feasances many of which I have already considered under the titles Trover Slander and Malicious prosecution see the titles and 3 Bl 5-2. 122. 1 Bac 44.

2 A mere neglect or nonfeasance to sustain this action must be a neglect of some duty imposed or recognised by law Esp 599. 2d Ray 917. 1 Com. L. 252. Bro Chr 217.

Thus this action will lie against a Sheriff for any neglect of duty to the damage of an individual Esp 603. 1 Roll 93. Salk 3 n 3. 1 B. & P. 367.

This action also lies for against a foreign agent for not effecting an insurance on the property of his principal according to his instructions in the three following cases.

1 Where the agent has effects of his principal in his hands as if A in New York having an agent in London who had his effects in his hands should direct him to insure a certain ship of his about to sail from London to New York and he neglects to do it this action lies against him for the damage occasioned by his neglect

2 Where a person has been in the practice of insuring for an other and neglects when directed to without having given previous notice of his intention to discontinue such practice

3 Where one accepts a Bill of lading sent on condition of his procuring an insurance on the cargo Marsh 3. 74. 205-6. 2 T R 188. 1 T R 157. Park 3. 303.

It lies also against a voluntary agent if he proceeds to execute his trust and by any mistake or neglect injures his principal See title Bailment and Marsh 3. 206-7. 209. 1 Esp R 74.

It lies also against any person professing business for an other in the way of his profession for carelessness or want of skill as if I deliver Cloth to a Tailor to be made in to a garment he is liable for any injury to it arising from his neglect or want of skill 2d Ray 214. 2 Wils 359. Esp 601. and title Bailment

This action also lies against a Surgeon for gross neglect by which his patient is injured 2d Ray 213. Esp 601. 2 Wils 359. 8 East 348.

But in such cases if the person undertaking does not make

it his practice or profession he is not liable for injuries arising from his want of due skill. It is said by Holt. that he is not liable in such a case for neglect because he says it is the folly of the patient to employ him this reason would apply to every case of Bailment and the bailee would never be liable for neglect The true rule is he is liable in such a case for neglect but not for the want of skill 3 Bl 122. 166. Holt 601. Ld Ray 214.

And it lies against any one in general by whose act or culpable neglect any person sustains an injury (e.g.) as for selling bad wine or erecting a smelting house so near another mans land as to injure the grass and herbage but he is not liable in these cases unless there is damage occasioned by the act 1 Roll 90. 95-3 Bl 122. 9 Co 57. Hutt 135.

In the sale of provisions the seller impliedly warrants that the provisions sold are sound and good in their kind But if I sell a horse and do not expressly warrant there no action lies against me unless there was a fraud on my part but of life which bad provisions has a tendency to injure the law is very tender 1 Saund 310. 3 Bl 166.

In many cases the owners of animals are liable for mischief done by them and in others not unless previously knowledge of their malicious disposition

For mischief done by a dog the owner must have had notice of his disposition to do mischief or he is not liable. In Cont the owners of dogs are subjected at all events for injuries done by them 2 Co Litt 350. Salk 662. 3 Salk 12. Holt 601.

Scienter in this case is of the gist of the action and must be expressly alledged in the declarations and proved (same auth.)

If the owner has notice of mischief done to one sort of animals as sheep he is liable for any injury done by them to another Ld Ray 209. Salk 662. 3 Salk 13.

Rule of Pleading. It is laid down in some books that the allegation of a scienter is not traversable very strange! the meaning of the rule is that a special issue cannot be taken on the scienter for it would amount to the general issue and besides the allegation of scienter is put in the non-matiné absolute and therefore can not be specially traversed 4 Coke 18. 1 Roll 4.

Case ex delicto

But for injuries done by those animals which are of a fere nature the owner is liable whether he has notice of their having done mischief or not for such animals are presumed to be addicted to mischief 1 Ld Ray 606. Bro Ab 25-4.

The owners liability in all these cases is founded on his neglect the act of the animal is not deemed the act of the owner and of course case is the proper remedy

This action lies for a disturbance which may be defined to be the unlawful hindering one from the free enjoyment of a right generally an incorporeal one such as obstructing a way Dr 3 Bl 236. 7 Co 112. 3 Lev 266. Bro Abr 245. 1 Vent 275. Stran 5. 638.

Again this action lies against an officer for permitting an escape See title Sheriffs & Gaolers and 2 Bac 245. 176. Bro Abr 17. Stra 873. Esp 609.

I here observe that when an action of debt is brought for an escape the Jury are bound to give the whole amount of the debt in damages but where case is brought they may give what sum in damages they think proper 2 Bl R. 1048. 2 T R 126. Esp 609. 610.

This action also lies for refusing sufficient bail when it ought to be allowed thus a Sheriff arrests one on mesne process and refuses to take sufficient bail case is the remedy and trespass will not lie Bro Ab 141 or 196. 2 Wil 313. 2 Mod 31. 4 Coke 44 b. 2 Roll 561-2.

This action also lies against rescuers the Pff may maintain the action against rescuers on mesne process It is said in Hobart that the Pff may maintain Trespass in such a case but I think trespass will not lie for it is no injury to the possession for the Pff has no possession either actual or constructive which is necessary to maintain trespass Bul 62. Co Mad 211. Jenkins 311. 3 T R 127. Hob 180. and besides the injury is not immediate It lies also in favour of the Pff against a rescuer whether the arrest was on mesne or final process. but against the Sheriff only where the arrest was on final process for there a rescue is no excuse for him which it is on mesne process Bro. Ab. 77 or 109. Esp 610. Watt 98. 4 Bac 599. But the Pff by suing the rescuers discharges the Sheriff Esp 610 and 4 Co. Sheriffs Bro.

In this action against a assignee the Jury are at liberty to give the whole of the original demand or any less sum but if the action of Debt is brought which is concurrent they must give the whole of the original debt Bul 62. Esp. 657.

(147) Attorneys are liable in this action for any neglect to the injury of their Clients as for negligently suffering a default non suit &c. 2 Wils 325. 4 Burr 2060. Salk 86. Esp 617.

And an attorney may become liable to the adverse party for any fraudulent conduct by which that party is injured. Hull 125. 2 Wils 377. 3 Bl 165. 1. Hall 209.

This action lies also against magistrates for any neglect in their official or ministerial capacity to the injury of third persons but for judicial acts or acts which lie in their discretion whether to do or not they are not liable for not doing 1 Leon 323. 1 Hawk 90. Esp 618.

Concerning the liability of magistrates for positive wrongs see title False Imprisonment.

If a person having brought a suit settles the claim before the writ is returned and does not countermand the return he is not liable 2 Wils 362. 1 B & P. 388.

This action lies against an Officer or corporation for a false return to a writ of Mandamus in favor of the person who is injured by the false return 1 Vent 111. Doug. 648. Salk 32 Doug 134.

It lies in general for all breaches of trust by bailees Esp 618. 2 Ld Ray 909. and title Bailment.

I will lay down one rule on this subject. for others see Bailment This action lies on the ground of negligence in all cases of Bailment for the want of that care which is required by law 4 Co. 83. Salk 26. Com R. 193. Ld Ray 909. Esp 618.

It lies against the owner or master of a vessel for goods lost or injured by the neglect of the master Salk 441. Esp. 623.

In the case of Lee Salt it was holden that if the ship owners were sued for such injury all must be joined and further that the non joinder of all might be given in evidence under the general issue to defeat the action Salk 441. 3 Ch 363.

Both rules are incorrect the distinction is that where the action is founded on the neglect all need not be joined 5 T R 649. 651. 3 East 62. 76.

But if the action against the owners is founded on the contract of Bailment all ought to be joined but in the latter case the non joinder must be taken advantage of by plea in abatement 5 Burr 2611. Esp 623. 5 T R 651.

Case ex delicto.

Postmasters are liable in this action each one for his own default or neglect and so are their subordinate officers each one for himself Cowp 765. 3 Wils 443.

But in the latter case the Postmasters are not liable for the default of their deputies as other masters are for the defaults of their servants for they are officers of the law and if the postmaster general was liable for the defaults and misconduct of his deputies so great would be his responsibility that no person would venture to assume the trust. It is said by Ld Holt Salk 17. that they are liable for the default of their deputies but not law Cowp 754 Esp 624.

Innkeepers are also liable in this action for the loss of the property of their guest by the neglect of that degree of care which the law requires and so also for such neglect of their servants 3 Bac 179. Palm 374. Bul 73. 1 Co. 32. 3 Bl 155-6. Esp 626 see Title Inns & Innkeepers

This action lies for a deceit or fraud in the sale of personal property as in the case of a false warranty as where one falsely warrants a horse to be his property 6 Esp 629. 1 Roll 90. Yelv 28. 6 Mod Rep 4.

It has also been holden that the vendor or lessor of land is liable for fraud in the sale or lease as where one to procure a lease declared that the rent of certain land was more than it really was Salk 211. in this action

But as to frauds in the sale of real property it is a general rule that the action dont lie because the sale is made by common assurance 1 Inst 384. note 1 Fonb 366. 2 Rains 193. Bro Title 34. 6 Rep 5. Sec. 57.

However in this State actions on the case for fraud in the sale of real estate have frequently been maintained

With regard to a warranty. Where there is an express warranty of the soundness of an article unaccompanied with any collateral stipulation or agreement and the warranty is false at the time of the sale, the vendee without returning the property and without giving notice to the vendor of the defect may maintain his action on the case against the vendor for the false warranty 1 Hen 317 2 J R 45.

But if the warranty is coupled with a collateral agreement

as that the vendor shall take back the property if it proves to be defective then the vendee must return the property before he can maintain this action 2 T R 745. 1 Comyn 194 note 2 H. Bl 573.

And if under such an agreement as the last the sale is rescinded by a return of the property to the vendor and his acceptance of it or without his acceptance if the contract dont require it the vendee may maintain the action of Indeb. Assumpsit for the price paid for the property but where Indeb. Assumpsit lies for the price the contract of sale is supposed rescinded but if the action is brought on the warranty the contract is not rescinded but affirmed and the action is for the breach therefore case is the proper action and assumpsit will not lie 1 T R 133. 136. Comyn 418. 5 East 449. 7 do. 274. Doug 23. 7 T R 481. Com Dig 3 K.

In Cases where the contract is not rescinded the action must be on the warranty and the action of Indeb. Assumpsit will not lie because an action on the warranty affirms the contract but Indeb. Assumpsit disaffirms the Contract therefore Assumpsit will not lie on the warranty and where the vendee sues on the warranty he does not return the property warranted nor does the vendor refund the whole price but the vendee recovers the loss he has sustained by reason of the defect 1 Selw 112 2 Selw 691-2 d and Com Dig.

But according to other opinions if goods sold are warranted sound and prove unsound the buyer may return them and disaffirm the contract of sale even if there is no agreement for that purpose 3 East R 93. 1 Selw 674 Bac. this last opinion is not agreeable to the current of authorities This last opinion is founded on the ground that the warranty is a condition precedent on which the contract is grounded and I think the former rule most agreeable to principle and authority Where there is an express warranty an action of assumpsit will lie on the warranty but it must be laid warrantizando Doug 20. But no action will lie on a warranty or affirmation where the vendee was guilty of such neglect as not see defects which were visible to mankind in general for it is his own folly to buy a thing as sound which it is obvious to every one is unsound. The maxim is the law will not assist fools and knaves 2d Roll. 1118. 1 Bac Ab 110. Finch. L. 289. 1 Salk 24.

So again where a vendor is negotiating for a sale affirmed that J.S. would give him so much for the article no action can be maintained on this warranty for the vendee might acquire of J.S. and find what he would give and besides it is a mere matter of opinion with the vendee how much he thought J.S. would give him

Case ex delicto

It is a general Rule that a general warranty will not subject the vendor where the defect was visible but in one case where a horse was sold and warranted sound when he had but one eye the declaration by the vendor that he was sound was held a warranty that his eyes were sound after verdict for vendee but I presume it appeared in the case that the fact that he was blind was unknown to the vendee Salk 211.

This rule obtains only I suppose in cases of a general warranty for if a person specially warrants as to a visible defect I trust it is binding for it is in the nature of an Insurance For the terms of the rule see 3 Bl 165. Est 630.

But if the special warranty was outrageous as that the horse had four legs when he had but three I should think it would not be binding. (So should I)

Case ex delicto continued in